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9 FELIX MOJICA-PERALTA

10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
12 **(HONORABLE BARRY TED MOSKOWITZ)**

13 UNITED STATES OF AMERICA,
14

15 Plaintiff,

16 vs.
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18 FELIX MOJICA-PERALTA,
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20 Defendant
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CASE No.: 07CR02984-BTM-1

DATE: 03/28/08

TIME: 11:30 AM

JUDGE: B T MOSKOWITZ

COURTROOM: 14

22 **POINTS AND AUTHORITIES:**

23 (a) SUPPRESS STATEMENTS DUE TO
24 VIOLATION OF MIRANDA;(b)
25 SUPPRESS STATEMENTS DUE TO
26 INVALID WAIVER

27 **BACKGROUND**

28 FELIX MOJICA-PERALTA is charged in an indictment with violating 8
U.S.C. §1326, Deported Alien Found in the United States. The indictment

1 charges that FELIX MOJICA-PERALTA was previously removed on September 28,
2 2007, through Calexico, California.

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4 I.

5 MOTIONS TO SUPPRESS

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7 A. STATEMENTS IN VIOLATION OF MIRANDA

8 ARGUMENT

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10 1. *The Government Must Establish a Knowing, Voluntary and Intelligent*
11 *Waiver of Miranda Rights*

12 The Fifth Amendment to the Constitution ensures a person's right against
13 self-incrimination. Custodial interrogation implicates the Fifth Amendment
14 privilege because of the danger that police officers might exert "informal
15 compulsion" on suspects during questioning. Miranda v. Arizona, 384 U.S. 436,
16 460-461 (1966). Before the government may introduce a defendant's
17 incriminating statement in its case in chief, it must prove a voluntary, knowing
18 and intelligent waiver of the accused's Miranda rights. Miranda, 384 U.S. at 475;
19 Moran v. Burbine, 475 U.S. 412 (1986). In Moran v. Burbine, the Court further
20 refined the concept of a valid waiver:
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25 First, the relinquishment of the right must have been voluntary in
26 the sense that it was the product of a free and deliberate choice
27 rather than intimidation, coercion, or deception. Second, the waiver
28 must have been made with a full awareness of both the nature of the
right being abandoned and the consequences of the decision to
abandon it. Only if the "totality of the circumstances surrounding the

1 interrogation” reveals both an uncoerced choice and the requisite
2 level of comprehension may a court properly conclude that the
3 Miranda rights have been waived.

4 Moran v. Burbine, 475 U.S. 412, 421 (1986).

5 In determining whether an accused validly waived his Miranda rights, a
6 court must consider the particular facts and circumstances involved in the case,
7 including the accused’s background, experience, intelligence, physical and mental
8 condition, and his conduct. Moran v. Burbine, 475 U.S. at 421; North Carolina v.
9 Butler, 441 U.S. 369, 373 (1979); Arizona v. Fulminante, 499 U.S. 279 (1991). A
10 court may find a proper waiver “ [o]nly if the ‘totality of the circumstances
11 surrounding the interrogation’ reveal both an uncoerced choice and the requisite
12 level of comprehension.” Burbine, 475 U.S. at 421.

13 It is not enough for the government simply to prove that the defendant
14 executed a verbal or written waiver.

15 Case law clearly indicates that it is not enough for law enforcement to
16 recite a person’s Miranda warnings without some explanation of those rights and
17 the consequences of foregoing the same. The government has the burden of
18 introducing sufficient evidence establishing “that under the ‘totality of the
19 circumstances,’ the defendant was aware of ‘the nature of the right being
20 abandoned and the consequences of the decision to abandon it.” United States v.

1 Garibay, 143 F.3d 534, 536 (9th Cir. 1998) (emphasis added). This burden is
2 “great” and this court must “indulge every reasonable presumption” against such
3 waiver. *Id.* at 537 (citations omitted).

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5 While not conclusive, the apparent failure of the agent to obtain a written
6 waiver of Miranda rights is a factor weighing in favor of suppression. In United
7 States v. Heldt, 745 F.2d 1275, 1277 (9th Cir. 1984), the Ninth Circuit found that
8 Heldt’s refusal to sign the printed waiver form cast doubt on any claim that he
9 had waived his Miranda rights. *Id.* The court noted that Heldt could reasonably
10 have believed that he waived nothing because he had refused to sign the waiver
11 form. *Id.* The failure of the DHS agent to obtain the written waiver form is even
12 more troublesome than the situation in Heldt. Whereas in Heldt the defendant
13 was at least provided the waiver form and thereby given the opportunity to refuse
14 to sign, it does not appear defendant was even proffered such a form.

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16 In the face of this failure, the **voluntariness** of any waiver of his Miranda
17 rights is highly questionable. Given that the government has the heavy burden of
18 demonstrating defendant’s valid waiver, the court should conduct a hearing to
19 determine whether in fact a constitutionally valid waiver of Miranda rights did in
20 fact occur. Such a hearing will further enable the court to ascertain the conditions
21 under which defendant’s statement was provided. Obviously, if the DHS did
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1 actually procure such a written waiver, defendant would ask that the court order a
2 copy to be provided to the defense.
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4 2. *The Government Must Demonstrate the Voluntariness of Defendant's*
5 *Statement*
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7 In addition to the deficient waiver of his Miranda rights, defendant also
8 challenges the government to demonstrate the voluntariness of any statements
9 given to the DHS. Although they are closely interrelated, the inquiry regarding
10 Miranda warnings and the inquiry regarding the voluntariness of a defendant's
11 confession are not coextensive. Oregon v. Elstad, 470 U.S. 298, 306-07 (1985); see
12 also New York v. Harris, 110 S.Ct. 1640, 1644 (1990); Lego v. Twomey, 404 U.S. 477
13 (1972); 18 U.S.C. §3501 (Miranda warnings are but factors to be considered by the
14 trial judge in determining if a confession is voluntary). "A Miranda violation does
15 not constitute coercion but rather affords a bright-line, legal presumption of
16 coercion, requiring suppression of all unwarned statements." Elstad, 470 U.S. at
17 306-07 n.1.
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22 The government additionally bears the burden of proving voluntariness by
23 a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972). Again, in
24 assessing the voluntariness of a defendant's statement, no one factor is
25 determinative; rather, the "totality of the circumstances" must be considered.
26 United States v. Kelley, 953 F.2d 562 (9th Cir. 1992) (quoting, Crane v. Kentucky ,
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476 U.S. 683 (1986), cert. denied, 484 U.S. 834 (1987)); Mincey v. Arizona, 437 U.S. 385 (1978); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); 18 U.S.C. §3501. The factors to be considered include both the characteristics of the accused and the details of the interrogation. Kelley, 953 F. 2d at 565; Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); 18 U.S.C. §3501. “Before [a] confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness.” 18 U.S.C. §3501 (emphasis added); see also Jackson v. Denno, 378 U.S. at 390-94; Commonwealth of Northern Mariana Islands v. Mendiola, 976 F. 2d 475, 483 (9th Cir. 1992); United States v. Batiste, 868 F. 2d 1089 (9th Cir. 1989).

3. **Conclusion:** *Defendant accordingly requests the court to conduct a hearing prior to the trial, wherein the government is held to its burden of establishing the voluntariness of his statements.*

B. SUPPRESS STATEMENTS DUE TO INVOLUNTARY WAIVER

1. *The government may make no use of a waiver, or any other statement, involuntarily obtained from a defendant in violation of the Fifth Amendment, Mincey v. Arizona, 437 U.S. 385, 398 (1977).*

The government must prove, in addition to formal compliance with Miranda, that any incriminating statement obtained from the defendant was given voluntarily. Lego v. Twomey, 404 U.S. 477, 484 (1972); Commonwealth v.

1 Mendiola, 976 F.2d 475 (9th Cir. 1992). A defendant may be properly warned and
2 freely waive as required under Miranda, yet ultimately be coerced into making a
3 confession. United States v. Fouche, 776 F.2d 138 (9th Cir. 1985). See also Oregon
4 v. Elstad, 105 S. Ct. 1285, 1298 (1985) (ultimate test of admissibility is always the
5 entire course of police conduct leading to statement) and Jackson v. Denno, 378
6 U.S. 368, 376 (1964).

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9 When law enforcement officers use psychological pressure to break down
10 the will of an accused, all statements elicited thereby are deemed involuntary. See
11 Spano v. New York, 360 U.S. 315 (1959). A *confession is involuntary whether it*
12 *occurs by physical intimidation or psychological pressure.* Arizona v.
13 Fulminante, 111 S.Ct. 1246 (1991); Townsend v. Sain, 307 U.S. 293 (1963);
14 Commonwealth v. Mendiola, 976 F.2d 475 (9th Cir. 1992). Subtle psychological
15 coercion, either by promises of leniency or indirect threats, may also render a
16 confession involuntary, United States v. Tingle, 658 F. 2d 1332, 1335 (9th Cir. 1981);
17 United States v. Leon Guerrero, 847 F. 2d 1363 (9th Cir. 1988), even when directed
18 at third parties, United States v. Wauneka, 842 F. 2d 1083 (9th Cir. 1988), United
19 States v. McShane, 462 F.2d 5 (9th Cir. 1972).

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22 The government bears a continuing burden to demonstrate *voluntariness*
23 throughout the course of the interrogation leading to the statement, and the
24 inquiry of necessity involves an evidentiary hearing on the issue. United States v.
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1 Batiste, 868 F. 2d 1089, 1092 n.5 (9th Cir. 1989, citing Denno, id.). No single factor
2 is determinative on the issue of voluntariness. Rather, this Court must look to the
3 “totality of all the surrounding circumstances.” Schneckloth v. Bustamonte, 412
4 U.S. 218, 226 (1973) and Mincey, 437 U.S. at 401.
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7 2. **Conclusion:** *Before the government can use any of [defendant]’s*
8 *statements as evidence, it must establish that they were taken in accord with the*
9 *above legal principles.*
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11 **II.**

12 **CONCLUSION**

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14 *For the foregoing reasons, the Defendant respectfully asks that the Court*
15 *grant the Defendant’s motions.*
16

17 Respectfully Submitted,
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19 **DATED:** March 21, 2008

SIGNED: s/ *Christian De Olivas*

20 CHRISTIAN DE OLIVAS
21

22 ATTORNEY FOR DEFENDANT
23 FELIX MOJICA-PERALTA
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